

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING
PHARMACY, INC. PRODUCTS LIABILITY
LITIGATION

This Document Relates to:
All Cases

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) MDL No. 1:13-md-2419-RWZ
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**JOINT MOTION OF CHAPTER 11 TRUSTEE AND OFFICIAL
COMMITTEE OF UNSECURED CREDITORS TO STRIKE OFFER
OF JUDGMENT FILED BY LIBERTY INDUSTRIES, INC.**

Paul D. Moore, the chapter 11 trustee (the “Trustee”) of New England Compounding Pharmacy, Inc. d/b/a New England Compounding Center (“NECC”), and the Official Committee of Unsecured Creditors appointed in NECC’s chapter 11 case (the “Committee”) respectfully request that this Court strike from the docket the Offer of Judgment filed by Liberty Industries, Inc. (“Liberty”). In support of this motion, the Trustee and the Committee state as follows:

On September 5, 2014, Liberty filed an Offer of Judgment [Doc. No. 1394] in this multidistrict litigation (the “MDL”), purportedly in accordance with Rule 68 of the Federal Rules of Civil Procedure. However, Rule 68 expressly provides that an offer of judgment is to be served on the opposing party initially and only filed if the offer is subsequently accepted. *See* Fed. R. Civ. P. 68(a) (“a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If . . . the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service.”); *Webb v. James*, 172 F.R.D. 311, 312 n. 1 (N.D. Ill. 1997) (“In addition to serving Plaintiff’s counsel with the Offer of Judgment, Defendants’ counsel also filed the offer with the Clerk of the Court. . . . This clearly was improper.”). Contrary to the

explicit procedures established by Rule 68, Liberty filed its Offer of Judgment rather than simply serving it upon the opposing party as Rule 68 provides.

Where a party files an unaccepted offer of judgment, the appropriate remedy is for the Court to strike the offer of judgment from its record. 12 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 3002 (1997) (“The defendant should not file the offer with the court, but if that is done by mistake the remedy is to strike the offer from the court’s file”); *see also Berberena-Garcia v. Aviles*, 258 F.R.D. 39, 40 (D.P.R. 2009) (“Courts have stricken the early filing of unaccepted offers of judgment”) (internal citations omitted). Accordingly, the Trustee and the Committee respectfully request that this Court strike Liberty’s Offer of Judgment from the docket of the MDL. The Trustee and/or the Committee will respond to Liberty’s offer privately in accordance with the procedures established by Rule 68.

CONCLUSION

For these reasons, the Trustee and the Committee respectfully request that this Court strike the Offer of Judgment from the docket in this case.

Dated: September 11, 2014

Respectfully Submitted,

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Certificate of Service

I, Michael R. Gottfried, hereby certify that on September 11, 2014, I caused a copy of the foregoing document, which was filed using this Court's ECF system, to be served electronically upon those parties registered to receive ECF service and by first class mail upon:

Darrel Cummings, DC# 088532
South Bay Correctional Facility
P.O. Box 7171
South Bay, FL 33493

/s/ Michael R. Gottfried
Michael R. Gottfried